DOCUMENT RESUME

ED 224 026 CS 207 268

AUTHOR Schwartz, Thomas A.
TITLE Warren E. Burger: Editor-In-Chief Justice of the United States?
PUB DATE Jul 82
NOTE 29p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (65th, Athens, OH, July 25-28, 1982).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Content Analysis; *Court Judges; *Court Litigation; *Freedom of Speech; *News Media; *Social Science Research
IDENTIFIERS *Burger (Warren); *Supreme Court

ABSTRACT

A study attempted to ascertain whether Supreme Court Justice Warren Burger demonstrated a particularly unfavorable attitude toward the press in a pattern of press-related decisions. Sixty press freedom cases located through the indexes of the official "United States Reports" were examined. Hypothesis 1 predicted that Burger assigned majority opinions in press freedom cases proportionately more often than he assigned majority opinions in nonpress freedom cases. Between 1969 and 1976, Burger made 85% of all possible assignments, and made 85% of the assignments for press freedom cases alone, so there was no relationship between the proportions of press freedom majority opinion assignments made by Burger and the other assignments he made. Hypothesis 2 asked whether Burger assigned himself majority author more often in free press cases than in nonpress freedom cases, presumably because he had a special interest in writing majority opinions to limit freedom of the press. His majority assignment load in nonpress freedom cases was nearly equal to those of the other justices, or about 12%. In press freedom cases, however, Burger assigned himself about 27% of the total, while an equitable average would have been about 11%. Overall, he chose conservative justices significantly more often than liberal judges to write majority opinions in all cases, and conservative justices in press freedom cases more often than conservative justices for nonpress freedom cases. (HTH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Thomas A. Schwartz

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

ED224026

CS207268

WARREN E. BURGER: EDITOR-IN-CHIEF JUSTICE OF THE UNITED STATES?

Thomas A. Schwartz

The Supreme Court of the United States, justifiably or not, has been the target of vehement attacks by the press in recent years because the Court has decided many cases unfavorable to the press. Some journalists have posited that because the Court has been dominated by four justices appointed by former President Richard Nixon, freedom of the press has been severely limited.[1] Some empirical research of voting patterns of the justices in press freedom cases indicates some of this criticism may be valid.[2]

The criticism has been generally directed at the "Nixon 4"--Chief Justice Warren Burger and Associate Justices Harry Blackmun, Lewis Powell, and William Rehnquist--but Burger has been particularly singled out for crucifixion. Time magazine, for example, dubbed him "Press Nemesis Burger."[3] Syndicated columnist Jack Anderson called Burger "the Scrooge of the First Amendment," who "clearly does not understand what a free press is all about." Anderson alleged that one of Burger's "most strongly held Nixonian biases is his detestation of the press."[4]

ABC Supreme Court correspondent Tim O'Brien noted Burger's "disdain for reporters" and hostility toward "television news."[5] Media attorney Paul J. Levine found in

Burger's opinions an "undisguised antipathy" toward "large media conglomerates."[6] Writer Robert Sherrill added: Burger's "personal loathing of the media" has "become increasingly apparent."[7] Dennis Hutchinson, Georgetown University law professor and former Supreme Court clerk, agreed that Burger "intensely dislikes the press."[8] Harvard law Professor Alan Dershowitz was quoted as saying Burger has made a conscious effort to "weaken the press."[9]

Most students would agree that the Burger Court has been generally "conservative" in its orientation, but press critics of the Court seem to say that at least Chief Justice Burger has gone out of his way to limit freedom of the press. Despite this strongly worded attack on Burger and his adjudication of press freedom cases, surprisingly little systematic research on this question appears in journals or in the popular press. Particularly lacking is research addressing Burger's alleged "hate affair with the press," as Anderson put it,[10] and whether this has affected Burger's behavior as a chief justice in press freedom cases.

This paper attempts to ascertain whether Burger has demonstrated a particularly unfavorable attitude toward the press in a pattern of actions as chief justice of the United States.

Methodology

Journalists Bob Woodward and Scott Armstrong, in their book about the Supreme Court,[10] reported several accusations against Chief Justice Burger which many observers of the Court suspect are true. Woodward and Armstrong, for example, alleged that Burger, in bad faith, has attempted to control the assignment of majority opinions even in situations when he should yield that power. Traditionally, the chief justice assigns the majority opinion to one of the justices in the majority of a case when the chief justice is a member of the majority; when he dissents, the senior-most justice in the majority assigns the majority opinion.

Woodward and Armstrong wrote that Burger has often either withheld his vote or changed his vote after it became apparent in some cases that he might be among a minority so that he could control the assignment of the majority opinion.[11] Although the practice of allowing a justice to change his mind anytime between the conference at which the vote is taken and the publication of the opinion is also a protected tradition at the Court, Burger has been pictured as deceptive in that he often changed his mind about the votes not because he became convinced that the other side was correct but because he wished to control the majority opinion either to temper the opinion's strength by assigning it to a conservative colleague or to himself or to demonstrate, at least on the record, that

he was "leading" the Court instead of contributing to its voting disarray.

Supreme Court scholar Walter F. Murphy would describe a chief justice who took advantage of such procedural options as "policy-oriented,"[12] and some research on the Court shows that such behavior by chief justices is common.[13] A student of judicial ideology would expect that these tendencies would be especially strong in cases in which the chief justice was particularly interested. Since press critics of Burger argue that he goes through extra pains to do harm to the press in First Amendment cases, a series of hypotheses suggests itself:

H_1: Burger tends to assign majority opinions in press freedom cases proportionately more often than he tends to assign majority opinions in non-press freedom cases.

H_2: Burger tends to assign himself majority opinions in press freedom cases proportionately more often than he tends to assign himself majority opinions in non-press freedom cases.

H_3: Burger tends to assign his conservative colleagues majority opinions in press freedom cases proportionately more often than he tends to assign his conservative colleagues in non-press freedom cases.

A number of corollaries logically flow from these hypotheses, but these shall suffice for the moment.

Between the start of the 1969 term, when Burger became chief justice, and the 1975 term, when data collection for

this study was stopped, the Supreme Court decided 60 press freedom cases. Press freedom cases were located in the indexes of the official United States Reports, Volumes 396 to 425, under the headings: "freedom of the press," "freedom of expression," "freedom of speech," "freedom of communication," and "freedom of speech and press."[14] In order for a case to qualify for the press freedom case sample, it had to meet the following criteria: (1) the case had to involve, at least minimally, the printed press or aspects of other media that would be interchangeable with the printed press so as to raise a First Amendment question as opposed to an administrative regulation question concerning, for example, the broadcast media; (2) the case had to prompt either or both litigants or any or all justices to invoke the freedom of the press clause of the First Amendment as a major argument; and (3) the case had to involve an attempted or successful interference with a "pure speech" communication with a mass audience through an institutional mass medium, for example, publication, broadcasting station or network, or theater, or through a non-institutional mass medium when the factual situation and the issue were so posed as to make the precedent of the case resolution applicable to the institutional mass media. Summary dispositions and other brief orders were not included in the sample; only cases meriting full opinions addressing the issues presented were included. Burger participated in all but one of the cases.[15]

Decisions in press freedom cases were determined to be favorable or unfavorable on the basis of two considerations: (1) which litigant claimed that freedom of the press was being abridged and (2) which litigant represented the media. Thus, when a litigant claimed that the press clause was violated by the other litigant and the first litigant prevailed in the case, the case was designated a favorable outcome. If the second litigant prevailed, then the outcome was designated unfavorable. Also, if the medium won its case, the outcome was designated favorable; if the competing litigant won, then the outcome was designated unfavorable. In a case in which both sides claimed their First Amendment rights were at stake, and when the medium won the case its outcome was designated favorable; if not, then unfavorable. Individual votes of the justices were designated favorable or unfavorable depending on their majority or minority participation in cases whose outcomes were favorable or unfavorable.

Data Analysis

Data compiled by Professor Dennis Haines in his study of Chief Justice Burger's general opinion-assignment habits show that during the 1971-1974 terms, the Supreme Court decided 262 non-press freedom civil rights cases.[16] While the Court decided in the liberal direction in 122 cases (46.6%) and in the conservative direction in 140 cases (53.4%), Burger voted in the liberal direction in 85 cases (32.4%) and in the

conservative direction in 177 cases (67.6%), a significant relationship ($X^2 = 10.9$, d.f. = 1, $p. < .01$).

During the same period, the Supreme Court decided 16 press freedom cases. The Court decided four of them (25%) favorably and 12 unfavorably (75%) which was not significantly different than the way the Court voted liberally and conservatively in non-press freedom civil rights cases ($X^2 = 2.4$, d.f. = 1, $p. > .10$). Burger voted in the favorable direction in the same proportions as the Court in press freedom cases (four favorable, 12 unfavorable) so, while Burger was more conservative than the Court in non-press freedom civil rights cases, he was equally unfavorable in press freedom cases. There was no significant relationship between how Burger voted in non-press freedom civil rights cases and how he voted in press freedom cases ($X^2 = .31$, d.f. = 1, $p. > .10$). This may be because he was more influential with his colleagues in press freedom cases than in other cases either by the force of his opinions or by the way he imposed his opinion-assignment authority.

H_1 predicts that Burger assigns majority opinions in press freedom cases proportionately more often than he assigns majority opinions in non-press freedom cases. This is based on the assumption that Burger will more often vote with the majority--either by delaying his vote or changing his vote or through his sense of the proper decision in a case--in press freedom cases than in non-press freedom cases because he wants to

insure that he controls the majority opinion to dilute favorable decisions and to write or have written strong anti-press opinions.

Haines, in studying the percentage of non-press freedom majority opinions assigned by Burger between 1969 and 1976, found that Burger made 682 out of 799 (85.3%) possible assignments. During the same period, the Court decided 68 press freedom cases, and Burger assigned 58 of the majority opinions (85.2%). There plainly was no relationship between the proportions of press freedom majority opinion assignments made by Burger and other assignments Burger made ($X^2 = 0$, d.f. = 1, p. $>$ .10).

This is not to say, however, that Burger, in either situation, has not attempted to assert unusual control over the assignment of majority opinions. It may be that the Warren Court enjoyed more consensus than the Burger court has[17] (although the press critics seem to say that the Burger Court is as uniformly anti-press as the Warren Court was pro-press) and hence Earl Warren naturally had more opportunity to assign majority opinions than Burger has had. Setting aside the obvious problems of comparing chief justices in different time frames, on different courts with different justices and with different cases, would a comparison of Warren's opinion-assigning behavior in his last six terms (1963-1968) on the Court with Burger's opinion-assigning behavior in his first six terms (1969-1974) reveal a relationship between approaches

to press freedom majority opinion assignment? From 1963 to 1969, Warren assigned 34 of the 38 (89.5%) press freedom majority opinions[18] while from 1969 to 1975, Burger assigned 58 of 68 press freedom majority opinions (85.2%).[19] There was no significant relationship between the proportions of majority opinions assigned by Warren and by Burger ($X^2 = .38$, d.f. = 1, p. $>$ .10). Both seemed to control a great majority of such assignments. H_1 cannot be retained.

H_2 asked whether Burger assigned himself majority opinion author more often in free press cases than in non-press freedom cases, presumably because Burger has had a special interest in writing majority opinions to limit freedom of the press. During the 1969-1975 terms, Burger assigned to himself 88 (12.6%) of a possible 697 majority opinions in all non-press freedom cases. If each justice was assigned an equal number of opinions, he would have written 77.3 opinions, or about 11.1% of the workload. Burger's load was nearly equitable in this regard.

In press freedom cases, however, Burger apparently did take a special interest. Of a possible 44 signed majority opinions in press freedom cases, Burger assigned himself 12 majority opinions, or about 27.3% of the total. An equitable average would have been 4.7 opinions, or about 11.1%. There was a significant relationship between the number of times Burger assigned himself majority opinions in non-press freedom cases and in press freedom cases ($X^2 = 7.4$, d.f. = 1, p. $<$ .01).

Professor Elliot E. Slotnik has studied the more general question of self-assignment of majority opinions by chief justices between 1921 and 1973.[20] Slotnik found that on the average, chief justices have assigned to themselves about 14.8% of the majority opinions, and that this proportion has declined from Chief Justice Taft's time (16.3%) to the present with Burger making self-assignments in about 13.7% of the cases. Although this figure is not significantly higher than 11.1%, which would be a completely random assignment rate, nor significantly higher than the self-assignment rate (12.6%) for senior associate justices who assign opinions when the chief justice is not in the majority, the chief justices "employed their prerogative in a blatantly self-advantageous manner" almost twice as often (24.8%) in "important" cases than in other cases.[21] Important cases were operationalized by Slotnik as cases mentioned in any two case lists of five leading constitutional law textbooks.[22] In such cases, Burger nearly doubled his self-assignment rate (25.7%).

If press freedom cases categorically can be considered "important" cases, then Burger's self-assignment rate for press freedom cases would not be unusually high, either in comparison to himself in non-press freedom cases or in comparison to other chief justices.

The same sort of operationalization of press freedom cases can be made to test whether Burger tended to dominate

the writing of "important" press freedom case majority opinions. Since press freedom is a much narrower area of law than constitutional law, a slightly more rigorous standard was imposed to find the "important" cases. If three of the leading five mass communication law textbooks placed the case in their case lists,[23] the case was deemed to be important.[24]

Of the 45 signed majority opinions in press freedom cases assigned by Burger during the 1969-1975 terms, 25 cases (55.5%) were "important" and 20 cases (44.4%) were "other." Burger assigned himself the majority opinion in 10 (45%) of the important cases and in two (10%) of the other cases, which is a significant relationship ($X^2 = 3.9$, d.f. = 1, $p. < .05$). Burger clearly has taken a special interest in writing majority opinions in press freedom cases, especially important press freedom cases. H_2 should not be rejected.

A chief justice might take into consideration a number of factors in deciding to whom he should assign majority opinions. Various writings have dwelt on the possible relative importance of, for example, legal specializations of the justices,[25] bargaining and reward,[26] writing proficiency of the justices,[27] ideology,[28] impact of the decision,[29] time constraints,[30] or fairness to the justices.[31] Press critics of the Court would argue that much of "Nixon's revenge" has been perpetrated by justices appointed by Nixon and other

conservatives on the Court, for example, Justices John Harlan and Byron White, Warren Court holdovers.

H_3 suggests that Burger tends to assign his conservative brethren majority opinions in press freedom cases proportionately more often than he tends to assign his conservative colleagues in non-press freedom cases. The assignees were dichotomized as conservatives and liberals, instead of by name, because the makeup of the Court during the 1969-1976 period changed. The four most conservative justices in any term were considered conservative assignees and the four most liberal justices in any term were considered conservative assignees. The designations were based on term-by-term rank ordering of the justices on scales of liberalism and press freedom favorableness in three studies.[32]

Although Burger already has been shown to assign himself a disproportionate share of press freedom majority opinions, he was included among the conservative assignees for the purposes of testing H_3. To correct for the imbalance of odd-numbered justices, the conservative assignments were reduced by 20%, or a fifth of the five conservative assignments.

In 609 corrected non-press freedom majority opinion assignments by Burger, he chose conservative justices 323 times (53%) and liberal justices 286 times (46.9%). In 36 corrected press freedom majority opinion assignments, Burger chose conservatives 27 times (75%) and liberals nine times (25%), which

is a significant relationship ($X^2 = 6.8$, d.f. = 1, $p. < .01$). H_3 cannot be rejected; Burger apparently not only assigns himself to write majority opinions proprotionately more often in press freedom cases than in non-press freedom cases but also assigns conservative justices to write majority opinions proportionately more often in press freedom cases than in non-press freedom cases.

Some of this difference, of course, may be accounted for by the fact that since his conservative conferees more often join the majority in press freedom cases than in non-press freedom cases because they are the majority, Burger has many more opportunities to assign them than he does the liberal justices; but the differences are too conspicuous given the numbers of times conservatives and liberals are available for majority opinion assignments.

Justice Blackmun, for example, agreed with the majority of the Court in press freedom cases more often than any other justice, including Burger, but Blackmun received a disproportionately low four majority opinion assignments. Stewart, who was much more favorable in press freedom cases and was a member of the majority in fewer cases, was assigned a disproportionately large nine majority opinion assignments.

[Insert Table 1 here.]

Obviously, something other than strict ideology guides Burger's opinion assignments, but overall, he chose conservative justices significantly more often than liberal justices

to write majority opinions in all cases and conservative justices to write majority opinions in press freedom cases more often than conservative justices to write majority opinions in non-press freedom cases.

Conclusions and Discussion

The Supreme Court of the United States generally has been a conservative court and generally has been unfavorable to the press during the past decade, at least in a strict quantitative sense. But it has been no more unfavorable to the press than it has been conservative in other civil rights and liberties cases. Chief Justice Warren Burger has been more conservative than the Court has been in voting behavior, but not more unfavorable to the press than the Court has been.

H_1 suggested he would join the majority and seek to control the majority opinion assignment more often in press freedom cases than in other cases; it was not retained, although this does not necessarily mean he did not take a special interest in press freedom majority opinion assignments because he controlled the vast majority of opinion assignments in all cases. On the other hand, Burger did not control majority opinion assignments in press freedom cases any more completely than did Earl Warren when he was chief justice.

H_2 suggested Burger would assign himself majority opinion author more often in press freedom cases than in other cases. This hypothesis was not rejected because Burger assigned

himself majority opinions in press freedom cases almost twice as often as he assigned himself in other cases. He was particularly interested in writing the majority opinion in important press freedom cases.

H_3 suggested Burger would assign conservatives to write majority opinions in press freedom cases more often than he would assign conservatives in other cases. This hypothesis was not rejected because Burger disproportionately assigned such opinions to conservative authors.

From a quantitative standpoint, Burger has displayed a desire to play a key role in determining the level of press freedom in the United States by manipulating his powers as the "first among equals" at the Court. Whatever "leadership" Burger may have in the Court in the area of press freedom has not been bestowed upon him as much as it has been asserted through his self-assignment of majority opinions.

The quality, as opposed to the quantity, of the opinions is left to the study of traditional legal analysts, although some have tentatively concluded that Burger has also been somewhat devious even in favorable majority opinions by conditioning the holdings on reasoning that may be unacceptable to press critics of the Court.[33]

Burger has written some classic defenses of press liberty in such cases as Miami Herald Publishing Co. v. Tornillo,[34] Columbia Broadcasting System, Inc. v. Democratic National Committee,[35] and Nebraska Press Association v. Stuart,[36] while

putting "an ominous gloss on freedom of the press," as Justice Douglas put it,[37] in such obscenity cases as Miller v. California,[38] Paris Adult Theatre I v. Slaton,[39] and Kaplan v. California.[40] Prof. Haines concluded a similar study by saying: "Chief Justice Burger was busy writing liberal, but narrow, statements about the first amendment's protections."[41] Burger has been careful to assign to himself majority opinions in liberal decisions possibly to gain a favorable, if limited, reputation as defender of the First Amendment, which once prompted one of the court's harshest critics, Lyle Denniston, to call Burger "one of the best friends of the press, constitutionally."[42]

Other Court observers are less willing to accept Burger's facade. Prof. Albert W. Alschuler, for example, complained that justices like Burger refuse to "play it straight" in their opinions:

> I know that if the chief justice were to vote his convictions more often and to explain his votes more forthrightly, I might like those votes less. I would, however, have greater respect for the chief justice's judicial performance.[43]

If Burger has frustrated or confounded his critics or supporters, it may be that, as Professor Everette E. Dennis appropriately observed, not all of the evidence is in and that it will take "years to sort out and analyze Burger's judicial views clearly" and what influences he has had on freedom of the press.[44] Burger, for one, would not be surprised that no trail has been left in the content of his

opinions. During his confirmation hearings, Burger challenged "other people" to discover any "certain pattern" that emerged from his voting. "I have never though(t) of it in terms of a pattern, very frankly," Burger testified. "I have decided cases as they have come before the court."[45]

No obvious pattern may emerge from the content of his opinions, but a pattern has emerged from Burger's voting, opinion-writing, and opinion-assignment tendencies, and it is a pattern that is not favorable toward the press.

ENDNOTES

[1]See, e.g., Fred Graham, "Judges Seem Determined to Show Who is Boss," Center 12 (March-April 1979):41; Sidney Zion, "High Court vs. the Press," New York Times Magazine, 18 November 1979, p. 76; Robert Friedman, "The Freedom of the Press Under Seige," New Times, 7 August 1978, p. 50.

[2]Guido H. Stempel III, "A Guttman Scale Analysis of the Burger Court's Press Decisions," paper presented at the annual meeting of the Association for Education in Journalism, East Lansing, Mich., 1981; Thomas A. Schwartz, "A Reconceptualization of the First Amendment: The Burger Court and Freedom of the Press, 1969-1979," paper presented at the annual meeting of the International Communication Association, Minneapolis, Minn., 1981.

[3]"A Fragmented, Pragmatic Court," Time, 17 July 1978, p. 45.

[4]Jack Anderson, syndicated columns distributed about 1 November 1978 and 12 December 1979.

[5]Tim O'Brien, "The Dubious Justice of Warren Burger," Saturday Review (December 1979):21.

[6]Paul J. Levine, "Legally Speaking: Assault on the Media," Editor & Publisher, 21 October 1978, p. 32.

[7]Robert Sherrill, "Injustices on the Burger Court," Playboy 26 (October 1979):230.

[8]Quoted in "Plugging a Leak," Time, 7 May 1979, pp. 97-98.

[9]Quoted in Sandra Stencel, "Burger Court's Tenth Year," Editorial Research Reports, 22 September 1978, 2:698.

[10]Bob Woodward and Scott Armstrong, The Brethren: Inside the Supreme Court (New York: Simon & Schuster, 1979).

[11]Ibid., pp. 64-66, 119-120, 170-172, 179-181, 187-189.

[12]Walter F. Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964), pp. 4-6.

[13]See, e.g., William A. McLaughlin, "Research Note: Ideology and Conflict in Supreme Court Opinion Assignment, 1946-1962," Western Political Quarterly 25 (March 1972):16-27; David W. Rohde, "Policy Goals, Strategic Choice, and Majority Opinion Assignments in the U.S. Supreme Court," Midwest Journal of Political Science 16 (November 1972):652-682; Gregory J. Rathjen, "Policy Goals, Strategic Choice, and Majority Opinion Assignments in the U.S. Supreme Court: A Replication," American Journal of Political Science 18 (November 1974):713-724; S. Sidney Ulmer, "The Use of Power in the Supreme Court: The Opinion Assignments of Earl Warren," Journal of Public Law 19 (1970):49-67.

[14]This period of time at the Court was selected so that the author could take advantage of data sets already assembled on Supreme Court voting in non-press freedom cases. See, e.g., John Paul Ryan and C. Neal Tate, The Supreme Court in American Politics: Policy Through Law (Washington, D.C.: American Political Science Association, 1975) and Dennis Haines, "Rolling Back the Top on Chief Justice Burger's Opinion Assignment Desk," University of Pittsburgh Law Review 38 (Summer 1977): 631-695. The sample sizes of cases will vary with the type of hypotheses under examination and with the data available in the corresponding data sets. Cross-tabulations are reported in Appendix C. Lists of cases are in Appendixes A and B.

[15]United States v. New Jersey Lottery Commission, 420 U.S. 371 (1975) (The Chief Justice took no part in the consideration or decision of this case).

[16]Haines, "Rolling Back the Top," p. 685.

[17]Even though this is the selective perception of many civil libertarians, it probably is not true--at least at the opinion-writing level. The Warren Court may have failed to produce a satisfactory theory of the First Amendment because its members simply never formed a consensus on its meaning. See Robert H. Birkby, "Supreme Court Libertarians and the First Amendment: An Analysis of Voting and Opinion Agreement, 1956-1964," Southwestern Social Science Quarterly 48 (March 1968):590-594.

[18]See Appendix B.

[19]Although this may give the impression that the Burger Court has shown greater interest in press freedom than the Warren Court did in this 10-year span, that is not necessarily so. An additional 27 press freedom cases were not counted because they were unsigned (per curiam) opinions during the Warren Court period. The Burger Court has six per curiam opinions from 1969 to 1975, narrowing the gap between the numbers of cases addressed by the respective courts.

[20]Elliot E. Slotnik, "The Chief Justices and Self-Assignment of Majority Opinions: A Research Note," Western Political Quarterly 31 (June 1978):219-225.

[21]Ibid., p. 222.

[22]Ibid., n. 7, p. 220.

[23]The books were: Donald M. Gillmor and Jerome A. Barron, Mass Communication Law: Cases and Comment, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1979), pp. XXIX-XLIII; Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communications: Freedom and Control of Print and Broadcast Media, 3rd ed. (Mineola, N.Y.: Foundation Press, 1978), pp. 649-660; William E. Francois, Mass Media Law and Regulation, 2nd ed. (Columbus, Ohio: Grid, 1978), pp. xi-xv; Don R. Pember, Mass Media Law, 2nd ed. (Dubuque, Iowa: Wm. C. Brown, 1981), pp. 497-503; Marc A. Franklin, The First Amendment and the Fourth Estate: Communication Law for Undergraduates (Mineola, N.Y.: Foundation Press, 1977), pp. XIX-XXIV.

[24]The "important" cases are followed by an asterisk in the case list in Appendix A.

[25]See, e.g., David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in Courts, Judges and Politics, ed. Walter F. Murphy and C. Herman Pritchett (New York: Random House, 1961), pp. 497-504.

[26]See, e.g., Walter F. Murphy, "Marshalling the Court: Leadership, Bargaining, and the Judicial Process," University of Chicago Law Review 29 (1962):640-664.

[27]See, e.g., Woodward and Armstrong, Brethren, pp. 172, 224.

[28]See, e.g., Haines, "Rolling Back the Top," pp. 631-695.

[29]See, e.g., Slotnik, "The Chief Justices," pp. 219-225.

[30]See, e.g., Danelski, "The Influence of the Chief Justice," pp. 497-504.

[31]See, e.g., Anthony Lewis, "A Talk with Earl Warren on Crime, the Court, the Country," New York Times Magazine, 19 October 1969, p. 130.

[32]Glendon Schubert, The Judicial Mind Revisited: Psychometric Analysis of Supreme Court Ideology (New York: Oxford University Press, 1974); Thomas A. Schwartz, "The Burger Court in Factorial Space," paper presented at the annual meeting of the Association for Education for Journalism, Houston, Texas, 1979; and Schwartz, "A Reconceptualization of the First Amendment."

[33]See, e.g., Francis I. Dale and Mitchell W. Dale, "Full Court Press: The Imperial Judiciary vs. the Paranoid Press," Pepperdine Law Review 7 (1980):241-312; Thomas I. Emerson, "First Amendment Doctrine and the Burger Court," California Law Review 68 (May 1980):440-470; Janice Gui, "Civil Rights in the Burger Court Era," Akron Law Review 10 (Fall 1976): 327-366; A.E. Dick Howard, "The Burger Court: A Judicial Nonet Plays the Enigma Variations," Law and Contemporary Problems 43 (Summer 1980):7-28; Tinsley Yarbrough, "The Burger Court and Freedom of Expression," Washington and Lee Law Review 33 (Winter 1976):37-90.

[34]418 U.S. 241 (1974).

[35]412 U.S. 94 (1973).

[36]427 U.S. 539 (1976).

[37]Miller v. California, 413 U.S. 15, 44 (1973) (Douglas, J., dissenting).

[38]413 U.S. 15 (1973).

[39]413 U.S. 49 (1973).

[40]413 U.S. 115 (1973).

[41]Haines, "Rolling Back the Top," p. 674.

[42]Lyle Denniston, "The Supreme Court: Today's Godfathers," Quill 64 (September 1976):35.

[43]Albert W. Alschuler, "Some Criticism Ill-Founded: Burger's Failure: Trying too Much to Lead," National Law Journal, 18 February 1980, pp. 19, 26.

[44]Everette E. Dennis, "Overcoming Occupational Heredity at the Supreme Court," ABA Journal 66 (January 1980):44.

[45]U.S. Senate, Committee on the Judiciary, "Hearings Before the Committee on the Judiciary, U.S. Senate, 91st Congress, 1st session, on the Nomination of Warren E. Burger, of Virginia, to be Chief Justice of the United States, June 3, 1969," (Washington, D.C.: Government Printing Office, 1969), p. 6.

APPENDIX A

TABLE OF CASES
FOR BURGER COURT

In chronological order:

Rowan v. Post Office Department, 397 U.S. 728 (1970)*
Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970)*
Hoyt v. Minnesota, 399 U.S. 524 (1970)
Blount v. Rizzi, 400 U.S. 410 (1971)
Perez v. Ledesma, 401 U.S. 82 (1971)
Dyson v. Stein, 401 U.S. 200 (1971)
Byrne v. Karalexis, 401 U.S. 216 (1971)
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)
Time, Inc. v. Pape, 401 U.S. 279 (1971)
Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)
United States v. Reidel, 401 U.S. 351 (1971)
Organization for a Better Austin v. Keefe, 401 U.S. 415 (1971)*
United States v. Thirty-Seven Photographs, 401 U.S. 363 (1971)
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*
New York Times Co. v. United States, 403 U.S. 713 (1971)*
Hicks v. Pleasure House, Inc., 404 U.S. 1 (1971)
Rabe v. Washington, 405 U.S. 313 (1972)
Lloyd Corp. v. Tanner, 407 U.S. 551 (1972)
Healy v. James, 408 U.S. 169 (1972)
Kois v. Wisconsin, 408 U.S. 229 (1972)
Gravel v. United States, 408 U.S. 665 (1972)
Branzburg v. Hayes, 408 U.S. 665 (1972)*
Kleindienst v. Mandel, 408 U.S. 753 (1972)
California v. LaRue, 409 U.S. 109 (1972)
Papish v. University of Missouri Curators, 410 U.S. 667 (1972)
Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973)*
Miller v. California, 413 U.S. 15 (1973)*
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)*
Kaplan v. California, 413 U.S. 115 (1973)*
United States v. Twelve Two-Hundred-Foot Reels of Super 8mm. Film, 413 U.S. 123 (1973)*
Pittsburgh Press Co. v. Pittsburgh Human Relations Committee, 413 U.S. 376 (1973)*
Heller v. New York, 413 U.S. 483 (1973)
Roaden v. Kentucky, 413 U.S. 496 (1973)
Alexandria v. Virginia, 413 U.S. 836 (1973)
Speight v. Slaton, 415 U.S. 333 (1974)
Pell v. Procunier, 417 U.S. 817 (1974)*
Procunier v. Hillery, 417 U.S. 817 (1974)

Saxbe v. Washington Post Co., 417 U.S. 843 (1974)*
Hamling v. United States, 418 U.S. 87 (1974)*
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)*
Letter Carriers v. Austin, 418 U.S. 264 (1974)
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)*
Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974)*
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1974)*
Indianapolis Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975)
United States v. New Jersey Lottery Commission, 420 U.S. 371 (1975)
Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975)
Huffman v. Pursue Ltd., 420 U.S. 592 (1975)
MTM, Inc. v. Baxley, 420 U.S. 799 (1975)
Murphy v. Florida, 421 U.S. 794 (1975)*
Bigelow v. Virginia, 421 U.S. 809 (1975)*
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)*
Hicks v. Miranda, 422 U.S. 332 (1975)
Time, Inc. v. Firestone, 424 U.S. 448 (1976)*
Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976)*
McKinney v. Alabama, 424 U.S. 669 (1976)
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)*
Young v. American Mini Theatres, 427 U.S. 50 (1976)
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976)*

*Important cases.

APPENDIX B

TABLE OF CASES
FOR WARREN COURT

In chronological order (not including per curiam opinions):

New York Times v. Sullivan, 376 U.S. 254 (1964)
Jacobellis v. Ohio, 378 U.S. 184 (1964)
A Quantity of Books v. Kansas, 378 U.S. 205 (1964)
Aptheker v. Secretary of State, 378 U.S. 500 (1964)
Garrison v. Louisiana, 379 U.S. 64 (1964)
Stanford v. Texas, 379 U.S. 476 (1965)
Freedman v. Maryland, 380 U.S. 51 (1965)
Dombrowski v. Pfister, 380 U.S. 479 (1965)
Zemel v. Rusk, 381 U.S. 1 (1965)
Lamont v. Postmaster General, 381 U.S. 301 (1965)
Griswold v. Connecticut, 381 U.S. 479 (1965)
Estes v. Texas, 381 U.S. 532 (1965)
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966)
Rosenblatt v. Baer, 383 U.S. 75 (1966)
Memoirs v. Massachusetts, 383 U.S. 413 (1966)
Ginzburg v. United States, 383 U.S. 463 (1966)
Mishkin v. New York, 383 U.S. 502 (1966)
Ashton v. Kentucky, 384 U.S. 195 (1966)
Mills v. Alabama, 384 U.S. 214 (1966)
Sheppard v. Maxwell, 384 U.S. 333 (1966)
Time, Inc. v. Hill, 385 U.S. 374 (1967)
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)
Associated Press v. Walker, 388 U.S. 130 (1967)
Walker v. City of Birmingham, 388 U.S. 307 (1967)
Zwickler v. Koota, 389 U.S. 241 (1967)
Ginzberg v. New York, 390 U.S. 629 (1968)
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)
St. Amant v. Thompson, 390 U.S. 727 (1968)
Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968)
United States v. O'Brien, 391 U.S. 367 (1968)
Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)
Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968)
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969)
Stanley v. Georgia, 394 U.S. 557 (1969)
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)

APPENDIX C

CROSS-TABULATION TABLES

Table C-1. Conservative and Liberal Voting by Burger and the Supreme Court in Non-Press Civil Rights Cases, 1971-1974 Terms.

	Conservative	Liberal	Total
Court Voting	140	122	262
Burger Voting	177	85	262
Total	317	207	524

$X^2 = 10.9$, d.f. = 1, $p. < .01$

Table C-2. Favorable/Liberal and Unfavorable/Conservative Voting by the Supreme Court in Non-Press Freedom and Press Freedom Cases, 1971-1974 Terms.

	Favorable/ Liberal	Unfavorable/ Conservative	Total
Non-Press Freedom Civil Rts. Cases	122	140	262
Press Freedom Cases	4	12	16
Total	126	152	278

$X^2 = 2.4$, d.f. = 1, $p. > .10$

Table C-3. Favorable/Liberal and Unfavorable/Conservative Voting by Burger in Non-Press Freedom and Press Freedom Cases, 1971-1974 Terms.

	Favorable/ Liberal	Unfavorable/ Conservative	Total
Non-Press Freedom Civil Rts. Cases	85	177	262
Press Freedom Cases	4	12	16
Total	89	189	278

$X^2 = .31$, d.f. = 1, $p. > .10$

Table C-4. Majority Opinion Assignments by Burger and Senior Associate Justices in Non-Press Freedom Cases and Press Freedom Cases, 1969-1975 Terms.

	Burger Assignments	Sr. Associate Assignments	Total
Non-Press Freedom Cases	682	117	799
Press Freedom Cases	58	10	68
Totals	740	127	867

$X^2 = 0$, d.f. = 1, p. $>$ .10

Table C-5. Majority Opinion Assignments by Burger and Warren and Senior Associate Justices in Press Freedom Cases, 1963-1975 Terms.

	Chief Justice Assignments	Sr. Associate Assignments	Total
Earl Warren Cases	34	4	38
Warren Burger Cases	58	10	68
Total	92	14	106

$X^2 = .38$, d.f. = 1, p. $>$ .10.

Table C-6. Self-Assignments and Other Assignments by Burger in Non-Press Freedom and Press Freedom Cases, 1969-1975 Terms.

	Self-Assignments	Other Assignments	Total
Non-Press Freedom Cases	88	609	697
Press Freedom Cases	12	31	43
Total	100	640	740

$X^2 = 7.4$, d.f. = 1, p. $<$ .01

Table C-7. Self-Assignments and Other Assignments by Burger in Important and Other Press Freedom Cases, 1969-1975 Terms.

	Self-Assignments	Other Assignments	Total
Important Press Freedom Cases	10	2	12
Other Press Freedom Cases	25	20	45
Total	45	22	57

$X^2 = 3.9$, d.f. = 1, $p. < .05$

Table C-8. Liberal and Conservative Assignments by Burger in Press Freedom and Non-Press Freedom Cases, 1969-1975 Terms.

	Liberal Assignments	Conservative Assignments	Total
Non-Press Freedom Cases	286	323	609
Press Freedom Cases	9	27	36
Total	295	350	645

$X^2 = 6.8$, d.f. = 1, $p. < .01$

TABLE 1

MAJORITY OPINION ASSIGNMENTS BY BURGER,
1969-1975 TERMS

Justice	Non-Press Freedom Assignments	Press Freedom Assignments	% of Cases Available to Get Assignment
Burger	102	12	88.9
Black	18 (2 terms)	1	88.9
Douglas	61 (6 terms)	0	50.0
Harlan	12 (2 terms)	0	66.7
Brennan	72	2	53.5
Stewart	85	9	83.8
White	92	6	89.9
Marshall	76	2	55.6
Blackmun	75 (6 terms)	4	91.7
Powell	66 (5 terms)	5	90.9
Rehnquist	73 (5 terms)	4	82.2
Stevens	6 (1 term)	1	67.4